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IN THE

Supreme Court of the United States

October Term, 1973

LOCAL 365 CEMETERY WORKERS GREEN ATTENDANTS BUILDING SERVICE UNION EMPLOYEES INTERNATIONAL AFL-CIO, SAM CIMAGLIA, President, SIGMUND CZAK, Vice President, JOHN THOMPSON, Financial Secretary-Treasurer, STEVE CIMAGLIA, Recording Secretary, "JOHN DOE" and "RICHARD ROE" whose real names are unknown to the plaintiff but who are members of the said Union,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APEALS

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IN THE

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OCTOBER TERM, 1973

LOCAL 365 CEMETERY WORKERS GREEN ATTENDANTS BUILDING SERVICE UNION EMPLOYEES INTERNATIONAL AFL-CIO, SAM CIMAGLIA, President, SIGMUND CZAK, Vice President, JOHN THOMPSON, Financial Secretary-Treasurer, STEVE CIMAGLIA, Recording Secretary, "JOHN DOE" and "RICHARD ROE" whose real names are unknown to the plaintiff but who are members of said Union,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APEALS

Petitioners pray that a writ of certiorari issue to review the judgment of the New York State Court of Appeals entered in the above entitled case on July 3, 1973.

Opinions Below

The Opinion of the New York State Court of Appeals, which has not yet been reported, is found in Appendix A hereto. The Opinion and Order of the New York State Supreme Court, Appellate Division, First Department, is also not yet reported but is reprinted here in Appendix B.

The Opinion of the New York State Supreme Court, Special Term, New York County, has also not been reported yet, but is printed in Appendix C.

Jurisdiction

The decision of the New York State Court of Appeals was made on July 3, 1973. This petition for a writ of certiorari is made pursuant to 28 U. S. C. 1257(3) in that it questions the validity of a state statute on the ground of its being repugnant to the Constitution and laws of the United States, and, in addition, involves rights, privileges and immunities claimed under the Constitution and statutes of the United States.

Questions Presented

1. Whether Chapter 585 of the New York State Laws of 1973 is unconstitutional in that it deprives petitioners of liberty and property without due process of law, through the delegation of legislative authority without sufficient standards?

2. Whether Chapter 585 of the New York State Laws of 1973 is unconstitutional in that it deprives petitioners of liberty and property without due process of law, through the failure to provide a hearing prior to the deprivation of the liberty and property of petitioners?

3. Whether Chapter 585 of the New York State Laws of 1973 is unconstitutional in that it denies equal protection of the laws to petitioners by creating an invidious discrimination against a particular class of Metropolitan New York Cemetery Workers who are on strike?

4. Whether Chapter 585 of the New York State Laws of 1973 is unconstitutional in that it constitutes involuntary servitude as prohibited by the Thirteenth Amendment to the Constitution of the United States?

5. Whether Chapter 585 of the New York State Laws of 1973 is unconstitutional in that it seeks to legislate in an area—the right to strike in an industry affecting interstate commerce—in which federal legislation has preempted the field?

6. Whether Chapter 585 of the New York State Laws of 1973 is unconstitutional in that it seeks to prohibit a right—the right to come to a collectively negotiated contract freely arrived at—which is guaranteed in 29 U. S. C. 157?

7. Whether if any portion of Chapter 585 of the New York State Laws of 1973 be declared unconstitutional, the entire statute must fall for lack of a severability or savings provision?

Statutes Involved

This case involves the construction and interpretation of Chapter 585 of the New York State Laws of 1973. The full text of this statute is set forth in Appendix D.

Statement of the Case

Petitioner, Local 365, Cemetery Workers and Greens Attendants Union, represents workers employed as gravediggers in 47 cemeteries in the New York City Metropolitan Area for the purposes of collective bargaining and the administration of grievances. All these cemeteries are joined together in a tripartite employer bargaining unit,

with one part of the unit representing Catholic cemeteries, a second Jewish cemeteries, and a third non-sectarian cemeteries.

Each of the cemeteries entered into a contract with Local 365 regulating the terms and conditions of employment for gravediggers which were substantially the same. It would be fair to characterize these contracts, despite some slight differences, as an industry-wide agreement.

All of these contracts bore a common expiration date: December 31, 1972.

Negotiations to conclude a new collective bargaining agreement were instituted substantially prior to the expiration of the contract, and said negotiations continued without job action into the spring of 1973.

Frustrated by an apparent unwillingness on the part of the multi-employer bargaining unit to reach a contract settlement, Local 365 symbolically struck three cemeteries in May, 1973, with each cemetery representing one section of the tripartite bargaining unit. Burials continued to be made either by supervisory and voluntary help, or non-struck cemeteries lent their facilities to the struck cemeteries for a temporary disposition of the dead.

Negotiations continued unsuccessfully and Local 365 struck all Metroplitan New York cemeteries on June 10, 1973.

Although the Commissioner of Health, Joseph Cimino, had publicly stated that despite the strike there would be no immediate harm to the residents of the Metropolitan Area, the Legislature created Chapter 585 of the Laws of 1973, providing "emergency procedures" to facilitate the burial of the dead in the New York City Metropolitan Area, and simultaneously outlawed the Cemetery Workers strike. In order to use this legislation, there was a statutory requirement that the Commissioner of Health render a determination that there was an "actual threat" to the

health of the residents of the New York Metropolitan Area. Despite his public pronouncement to the contrary, upon the passage of the legislation, Commissioner Cimino changed his mind and rendered a contradictory determination in order that the "emergency procedures" could go into effect. Acting pursuant to the statute, the Attorney General of the State of New York applied for an injunction which was granted on June 21, 1973.

An appeal was taken to the Appellate Division, First Department, of the New York State Supreme Court on June 28, 1973, stressing that the procedural Due Process arguments and the Equal Protection argument related to the guarantees of the Fourteenth Amendment to the United States Constitution. On the same day, the Court upheld the legislation and the injunction issued thereunder, without opinion. An appeal was taken to the New York State Court of Appeals on July 2, 1973. The following day, the Court affirmed the validity of the legislation and the injunction based thereon, although no order has yet been entered, and no decision has yet been received from the Court.

It is that determination which is now sought to be reviewed before the Supreme Court of the United States.

Reasons Why the Writ Should Be Granted

I.

Chapter 585 of the New York Laws of 1973 does not provide a constitutionally sufficient standard by which the Commissioners set in motion the statutory machinery for outlawing the strike and providing for compulsory arbitration.

The emergency procedures authorized by Section 2 of the statute provide that emergency mediation shall take place, followed by the submission of all outstanding issues in the Cemeteries-Cemetery Workers dispute to binding

arbitration, while simultaneously outlawing not only a strike by the Cemetery Workers, but any withholding of services by any individual worker.

This drastic private-sector solution to the collective bargaining impasse is actuated upon receipt of the certification of the Industrial Commissioner that there exists a labor dispute involving the cemeteries in the New York City Metropolitan Area which cannot be resolved through the ordinary procedures of collective bargaining, and the receipt of the certification of the Commissioner of Health that said dispute has resulted in an actual threat to the health and welfare of the residents of the state.

There is no guide in the legislation by which either Commissioner may judge when there exists the determination he is called upon to make.

Both of the determinations are to be made in areas ill defined and vague. The Legislature could have specified standards by which both Commissioners could judge the existence of the insoluble emergency, just as it did with enumeration of seven factors to be taken into consideration by the compulsory arbitrators in arriving at their binding award.

In fact, the determinations which the Commissioners are called upon to make are couched in such a way as to provide not only an unconstitutionally vague standard, but are actually so overbroad as to be meaningless. The determination to be made by the Industrial Commissioner is whether the labor dispute can be resolved through the employment of currently authorized collective bargaining procedures. What is inherently missing from this requirement for a determination is the amount of time that successful collective bargaining would take. It is elementary in the area of labor relations that given enough time

and enough effort, the parties will eventually reach a determination. Yet, the legislation fails to specify a time in which the impasse must fail to end to receive the certification of the Industrial Commissioner.

Similarly, the question as to what "currently authorized collective bargaining procedures" encompasses is not answered by the statute. Is the Industrial Commissioner to be limited in his determination to face-to-face collective bargaining between the parties, that is, the Cemeteries' bargaining unit and the Cemetery Workers' union alone, without resort to third party aid? Or may the Industrial Commissioner consider face-to face negotiations plus mediation? Or, does the term "currently authorized collective bargaining procedures" also include those forms of self-help often resorted to in the private sector, where they are legal, as an adjunct to face-to-face negotiations and mediation, namely, job-actions by labor, and such weapons as the lock-out by the employer?

In an identical way, the determination which the Commissioner of Health, is called upon to make is similarly bereft of guidelines, and, if anything, his determination is the more fraught with imprecision. The statute calls upon him to determine when an "actual threat" to the health and welfare of the residents of the state has occurred. Curiously, since this legislation is solely directed at Cemetery Workers in the Metropolitan New York City Area, does the phrase "actual threat to the health and welfare of the residents of this state" require the Commissioner of Health to certify an actual threat only when the health of the residents of New York State *generally* are endangered, or solely when the residents of this certain part of the state are endangered, or even when one resident of the state, wherever situated, is endangered? Furthermore, and perhaps most significantly, what is an

"actual threat"? The words themselves suggest an oxymoron. What is an "actual threat"? The word "actual" connotes definiteness, precision and certainty; the word "threat" suggest possibility, contingency and indeterminateness.

Does this mean any threat? For certainly, if it means any threat, no guidelines would be needed, and this argument would fail, since it is entirely possible that any dispute, no matter how trivial the basis from which it springs, could result in a "threat" to the health and welfare of the citizens if ultimately serious enough and protracted enough. Therefore, is "any threat" the test? Or, is some other test required by the legislation? Is the Commissioner of Health required to use a balance, by which he considers the progressive gravity of the labor dispute and/or the increasing gravity of the health situation?

To raise all of these perfectly plausible, however contradictory, meanings for the words of the statute is to demonstrate how lacking in guidelines is the legislation.

Petitioner is aware that proving legislation unconstitutional is a heavy burden. Nevertheless, it is an established principle of law that the Legislature may not delegate its powers to administrators without a standard to guide, and in the instant case, both the liberty and the property of the Cemetery Workers affected by this statute would be taken without due process of law should the New York State Legislature be permitted to delegate its powers to unguided administrators.

The legislative history is clear, however, that the above rule on which Petitioner relies has been limited since its original exposition in *Panama Refining Company* v. *Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935), and

Schecter Poultry Corporation v. *United States,* 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935). As was accurately stated in *Kelly* v. *United States Department of Interior,* 339 F. Supp. 1095, 1098 (E. D. Cal. 1972):

> "The potentially broad applications of *Panama* and *Schechter,* by now the standard citations for those who attack Congressional delegations, never blossomed. In *Fahey* v. *Mallonee,* 332 U. S. 245 at 249, 67 S. Ct. 1552, 91 L. Ed. 2030 at 2036 (1947), the Supreme Court itself narrowly construed the decisions: both cited cases dealt with delegations of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom."

It would seem clear that the Cemetery Workers statute comes within the *Fahey* construction of the line of cases exemplified by *Panama* and *Schechter.* Both of the tests of *Fahey* are met. In the instant case, the determinations of the two administrators make crimes of formerly legal activity. In fact, this is activity which is encouraged under 29 U. S. C. 101 ff., the Norris-LaGuardia Statute, and under 29 U. S. C. 151 ff., as amended, the National Labor Relations Act.

Not only does the Cemetery Workers statute fall within the first section of the *Fahey* construction, it also meets the second test, in that the Commissioners must devise novel rules in an area where there have been neither settled law nor custom in the past. The Commissioner of Health has not been called upon in the past to determine whether there has been an "actual threat" to the public health and safety, nor has the Industrial Commissioner been called upon to determine that a labor dispute can-

not be resolved through currently authorized collective bargaining procedures.

The concept of requiring adequate standards to guide administrative determinations was unequivocally recognized in the leading New York State case on the subject, *City of Utica* v. *Water Pollution Control Board*, 5 N. Y. 2d 164, 182 N. Y. S. 2d 584 (1959).

The *Utica* case concerned the delegation of authority by the New York Legislature to the State Water Pollution Control Board, whereby said Board was to enact standards of purity, after hearings involving municipalities, and after considering (1) the level of pollution in streams, (2) the character of the surrounding land use, (3) the use usually made of the waters, (4) the physical nature of the stream, etc.

Not only did the Legislature clearly delineate the exact considerations for the Board's standards of purity, it further mandated specific factors such as "floating solids", "suspended solids", "colloids", etc., which would enter into the Board's determination.

The Court of Appeals, citing *Panama* and *Schechter*, ruled that the Legislature may constitutionally only confer discretion upon an administrative agency if it limits the field in which that discretion is to operate and provides standards to govern its exercise. While holding that a precise or specific formula need not be furnished in every field, it would be enough if the Legislature were to lay down "an intelligible principle, specifying the standards or guides in as detailed a fashion as is reasonably practicable . . .", 5 N. Y. 2d 164, 169.

Certainly if this is the test enunciated by the highest court in the State of New York, the Cemetery Workers Statute, Chapter 585, must be an unconstitutional delegation of power as no guidelines whatsoever were legislated.

II.

The Cemetery Workers have also been denied due process of law in that no hearing was held by the administrators charged with determinations under the statute.

The Industrial Commissioner should have given a notice to all interested parties and held a hearing to determine whether there actually existed a labor dispute which could not be resolved through the employment of currently authorized collective bargaining procedures. Identically, the Commissioner of Health should have advanced the same procedural safeguards in making his determination that there existed an actual threat to the health and welfare of the residents of the state.

Particularly are the requirements of notice and hearing significant in a case such as the instant one where, as pointed out above in I, *supra,* no standards were delineated by the Legislature to aid these Commissioners in arriving at their determinations.

Whether or not a hearing shall be required in the administration of a statute is determined by resorting to the "rudiments of fair play" long known to the law. *Morgan* v. *United States,* 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 (1937). See also the concurring opinion of Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 339 U. S. 910, 70 S. Ct. 593, 94 L. Ed. 1337 (1949).

Certainly, the rules of fair play require a hearing in the instant situation where such a drastic curtailment of individual freedom—a freedom encouraged by the Norris-LaGuardia Act and the National Labor Relations Act—is mandated. An examination of the equities in the instant situation leads to the conclusion that failure to provide all interested parties with notice and to hold a hearing, at which all parties would have the opportunity to inform the respective Commissioners of the actual state of affairs,

constitutes deprivation of due process in this case. Especially is this so in light of the lack of definitive standards. This is even more so when the determination to be made, the nebulous "actual threat", is of such a speculative nature that it is doubtful that the administrator can make an intelligent determination without substantial investigation. It must be borne in mind that the Legislature was not requiring the Commissioner of Health to make a determination of actual danger: only an actual "threat" was required. To curtail the right to strike based upon only a "threat" without any showing of actual anger is a drastic prohibition indeed. Analogously, the state cannot arrest every person who carries a gun on the theory he is about to commit crime, for he may be on his way to hunt or he may be about to participate in a marksmanship competition. Government does not rule out of the air an airplane contemplating a five-hundred mile flight simply because it will require an overhaul in ten thousand miles. Clearly, the statute did not require any immediate harm or danger before the Commissioner was required to make his determination of an "actual threat". Under these circumstances, a hearing should have been required.

Furthermore, the lack of any formula for judicial review of his determination is also significant. The New York courts have held in *Mount Saint Mary's Hospital of Niagara Falls* v. *Catherwood* (1970), 26 N. Y. 2d 493, 311 N. Y. S. 2d 863, that due process required substantial judicial review of a compulsory arbitration award even where the Legislature had clearly delineated guidelines to guide the arbitrator in making his determination. In fact, in *Mount Saint Mary's*, the New York Court of Appeals was required to place a new construction upon the arbitration review clause of the State Civil Practice Law and Rules in order that the actual arbitration hearing be held

not violative of due process. In the instant case, no judicial review was provided in a situation where, unlike *Mount Saint Mary's,* there were no legislative guides for the Commissioner to follow in making a determination—curtailment of the right to strike—which was far more serious than the rendering of a compulsory arbitration award.

Highly relevant to the question of whether a hearing is required by due process is the case law. Not only the Federal, but even the New York State, case law, is clear that where one is being deprived of a right or privilege formerly enjoyed, due process requires an evidentiary hearing. *Sumpter* v. *White Plains Housing Authority,* 29 N. Y. 2d 420, 328 N. Y. S. 2d 649, 278 N. E. 2d 892, Cert. Den. 406 U. S. 928, 92 S. Ct. 1803, 32 L. Ed. 2d 130 (1972).

Hearings have been required in a broad range of cases, of practically every conceivable factual situation, wherever there was a question which could be best determined through the use of an evidentiary hearing, whether this be in relation to agriculture and milk marketing, *Ideal Farms, Inc.* v. *Benson,* 181 F. Supp. 62 (D. N. J. 1960), or the discharge of teachers, *Bates* v. *Hinds,* 334 F. Supp. 528 (N. D. Texas 1971), or the distribution of property, *Kelly* v. *Metropolitan Board,* 293 F. Supp. 485 (M. D. Tenn. 1968), or the suspension of students from school, *Black, etc.* v. *Williams,* 335 F. Supp. 820 (M. D. Fla. 1972).

It is to be anticipated that in opposing this application for a writ of certiorari, the State of New York will indicate that while under differing circumstances a hearing might have been held, various factors mitigated such hearing. Petitioner has sought to consider the possibility of such mitigating factors, but Petitioner has found ample support for its own position in the case law in opposition to the positions it expects the State to advance.

It is clear that the State would argue that this legislation was enacted in an emergency situation, and that had there been granted a hearing, it could not have been held so expeditiously as to prevent the evil against which the legislation was directed. Nevertheless, the case law has indicated that even in cases of the emergency classification of poisons, it was improper for the Secretary of Agriculture to make such a determination without a hearing. *PAX of Utah* v. *U. S.*, 324 F. Supp. 1335 (D. Utah 1970).

The State could advance the proposition that it would have been highly inconvenient and cumbersome to require a hearing, as there may have been many individuals involved who would have requested the opportunity to testify. Nevertheless, administrative convenience cannot overcome the requirements of due process. *Cella* v. *U. S.*, 208 F. 2d 783 (C. A. 7, 1953).

Appellant also contemplates that the State will argue that the right to strike is a privilege and not strictly speaking a "right" as that term is constitutionally understood. Nevertheless, said right to strike has been encouraged through the National Labor Relations Act and similar statutes, and the case law is clear that by calling a right a privilege, this does not eliminate due process requirements when a significant thing of value is involved. *Hornsby* v. *Allen*, 326 F. 2d 605 (C. A. 5, 1964), reh. den. 330 F. 2d 55 (C. A. 5, 1964).

III.

Appellant has further been deprived of equal protection due to the creation of arbitrary class legislation, constituting invidious discrimination, in that the class does not rest upon any real and substantial difference between those in the class and those without the class.

As a general proposition, any class legislation must have a legitimate purpose, must not discriminate against those within the class as opposed to those outside the

class, and must treat all those within the class equally. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 68 S. Ct. 1064, 30 L. Ed. 220 (1885). Those differences which set apart the class must not be based upon consttiutionality impermissible criteria. While Petitioner concedes that a state has broad power in making classifications, it may not draw up a group in such a way that it constitutes an invidious discrimination against a particular class. *Skinner* v. *Oklahoma*, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1941); *Levy* v. *Louisiana*, 391 U. S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 1968).

Even if the classification is not based upon constitutionally impermissible criteria, nevertheless the distinctions which set apart the class which is the basis of the legislation must be real and substantial, *Yick Wo* v. *Hopkins*, *supra*.

In the instant case, the class that is drawn is an extremely narrow one: these are Cemetery Workers within the New York Metropolitan Area who are on strike.

It can be seen that this extremely narrow classification readily is broken down into three sub-classifications: Cemetery Workers; in the New York Metropolitan Area; who are on strike.

This general classification, as well as its three subdivisions, all create such a narrow class that the statutory classification system itself must pass a very close scrutiny. *Benz Sons* v. *Ericson*, 227 Minn. 1, 34 N. W. 2d 725 (1948).

Even if Petitioner separately takes each of the subclassifications, therefore making the class a little less narrow, there are no real and substantial differences such as to set aside this class from all others in such a way as to validate the legislation. Let us take each of the sub-classifications in turn.

First, we consider the sub-classification of cemetery worker. What is the significance of only considering cemetery workers? There is no constitutional warrant to select the employees of a particular industry and apply particular class legislation solely to them. While it is recognized that the burial of the dead is an important social function, there are many important social functions of a similar nature in a free society such that this should not be the sole industry for collective bargaining prohibitions. For example, there are employees of private water companies who, upon striking, could prevent the distribution of this significant utility to the public. Similarly, strikes by electrical workers could cause the loss of light, heating and cooling functions, and many of the other functions by which our society operates. As a general proposition, to direct legislation solely at cemetery workers when there are many other public-interest although private industries situated in even more sensitive areas is to create a class which is irrational, arbitrary, and constitutes invidious discrimination.

The *second* sub-classification is the geographic distinction whereby the legislation is limited to the Metropolitan New York City Area. While in some cases geographic classifications have been held valid, the classification must bear some relationship to the end sought to be accomplished by the legislation. This has even been recognized in New York State, where it has been held invalid to prohibit incinerators in one borough of the City of New York, while permitting them in others. *New York Sanitary Utilization Company* v. *Public Health Department*, 32 Misc. 577, 67 N. Y. S. 324 aff'd. 61 App. Div. 106, 70 N. Y. S. 510 (1901). Similarly, geographic distinctions between public officers in the City of Chicago from all of the public officers in the State of Illinois have been held

invalid, *Badenoch* v. *Chicago*, 222 Ill. 71, 78 N. E. 31 (1906), and a statute requiring the election of trial judges in one county of Virginia while permitting appointment of judges in all other counties has similarly been held unconstitutional, *Quesinberry* v. *Hull*, 159 Va. 270, 165 S. E. 382 (1932), special voting regulations for the City of Memphis did not survive a general Tennessee statute providing for voting regulations, *Malone* v. *Williams*, 118 Tenn. 390, 103 S. W. 798 (1907).

While it is true that distinctions based upon the size of a city or county have been held valid, the geographic distinction mandated by the legislature here sprawls across any city or county line into the amorphous "Metropolitan New York" area.

A further problem with the geographic distinction is that the limitation to one corner of the state itself is an invalid distinction. Is there any less of a public health hazard created if all the cemetery workers in seven upstate New York counties were to strike? Or, all the cemetery workers in Albany County were to strike? In each case, would the Legislature enact a new statute, with different procedures for each individual part of the state afflicted with a strike in the cemetery industry? Would the State of New York then have a separate procedure for each county, as well as each metropolitan area, wherein the burial of the dead was not proceeding? To answer this question in the affirmative leads us only to the conclusion that the Legislature could then similarly enact in all other industries affecting the public heath, and could delineate whatever geographic standards were politically prudent at the moment. If the citizens of Bath, New York, sought to prevent the cemetery workers of Bath, from striking, would the Legislature immmediately sit to concoct a piece of legislation to eradicate *ad hoc* that strike,

just as was done herein the New York Cemetery Workers' strike?

Would it be a long step then for the citizens of Utica, New York, to demand that the Legislature create a formula for ending a strike of the private water supply workers afflicting that city? Would the citizens of Waterville successfully prevail upon the Legislature to enact a procedure whereby the bus drivers of that city could no longer strike?

To ask the question is to answer it. To follow the rationale of the geographic and occupational classifications set out here by the New York State Legislature leads only to the absurd.

Yet a *third* sub-classification is still to be considered. This legislation is only aimed at those workers who are striking. Striking must not create a separate class. Striking, in and of itself, is legal in the private sector, and has been specifically validated, even encouraged, by New York State's Labor Law, and the State's "little Norris-LaGuardia Act". The only difference that sets apart the class is that the group of workers in New York City have refused to work under certain conditions of employment, and other workers have not so refused. Why not prohibit inefficient work as well? Why not set quotas of work in this particular industry in this particular locale which must be met?

Appellants submit that they have demonstrated above that each of the sub-classifications, broader than the actual legislation, constitutes an arbitrary class constituting invidious discrimination, such as to deprive Petitioners of equal protection of the laws.

The more narrow class, joining together all three sub-classifications considered above, is such a narrow class

that it must be invalid on its face. In *Levy* v. *Louisiana, supra,* Justice Douglas indicated that the end result of the determination whether invidious discrimination is created is whether the line drawn is a rational one. Appellants believe that that test must be answered here in the negative. Particularly is this true, as in the present case, when the entirely *ad hoc* nature of the legislation suggest political opportunism and a pandering to the voting power of a populace which disliked an unpopular, although concedely legal, strike. It is to be hoped that the Supreme Court of the United States will take jurisdiction in this matter in order that it may bring its objectivity to bear in the present proceeding. This legislation, unconstitutional on its face, was validated successively by both levels of the New York Appellate Courts in the wake of intense political pressure. Appellants ask the Supreme Court to do that which the State courts refused to do, that is to look at it objectively. The New York courts rushed to judgment; Appellants ask the Supreme Court to exercise its judgment based upon that objectivity provided by time and distance.

IV.

This legislation provides for involuntary servitude, and therefore is in violation of the Thirteenth Amendment of the United States Constitution.

In the past several years, citizens ranging the gamut from draftees to baseball players have sought to invoke the involuntary servitude provisions of the Thirteenth Amendment to invalidate legislation or contracts.

The rule appears to be that one must be free to walk away from his job despite contract or statute to the contrary, under the protections of the Thirteenth Amendment. *Pollock* v. *Williams,* 322 U. S. 4, 64 S. Ct. 792, 88 L. Ed. 1095 (1943), *Flood* v. *Kuhn,* 443 Fed. 2d 264 (C. A. 2d

1971), Cert. granted 404 U. S. 880, 92 S. Ct. 201, 30 L. Ed. 2d 160.

In *Pollock*, the Supreme Court ruled that contracts of labor could not be specifically enforced even where the laborer was a debtor who was providing his labor to liquidate his debts. The Court held that it would be a violation of the involuntary servitude amendment to require labor from a specific individual against that individual's wishes. In *Flood*, the Second Circuit was presented with a major league baseball player who argued that the reserve clause of the standard baseball contract contained indicia of slavery in that it allowed him to be transferred from team to team as property and did not leave him free to labor as he chose. The Court in *Flood* suggested that requiring him to play for the team to which he was assigned was not involuntary servitude, since Flood was free to walk away from major league baseball and was not bound to play for any of the twenty-four major league baseball teams.

The rule therefore seems to be that if one may quit his occupation, involuntary servitude does not come into consideration. However, the Cemetery Workers statute, by not allowing Metropolitan New York City Cemetery Workers to quit their job, does contravene the Thirteenth Amendment.

The statute does not simply prohibit striking, but makes illegal and enjoinable any "withholding of services". While the basic thrust of the legislation is to restrain the union from encouraging, and the workers from participating in, a strike, forbidding the "withholding of services" does mandate compulsory servitude. It would appear clear that should the union, adhering to the statute, succeed in persuading most of its individual members to return to work, one individual working at one cemetery could be

made guilty of a criminal offense if he refused to return to the job. A worker, disgusted with the legislation and anticipating, as actually happened, a weaker contractual settlement because of the additional weapon granted to the employer by the legislation, might decide to dissociate himself from his former occupation. Under the statute, this would make him guilty of a criminal offense. His return to work would be required.

From the way the legislation is drawn, a worker who becomes disenchanted with his employer's conduct during the course of the strike would nevertheless be required to work for that employer instead of having the freedom to trade in his grave-digging shovel in New York for a grave-digging shovel in Pennsylvania.

In this context, the arbitrary classification, the failure to provide a hearing, the lack of any legislative standards in guiding the determinations of the Commissioners become all the more amplified. It is submitted that the Legislature has grossly overstepped its legitimate lawmaking authority in providing for this striking intrusion upon the personal freedom and liberty of individuals in a free society.

V.

The legislation is unconstitutional, as violative of the supremacy clause, since federal legislation has pre-empted the field.

We start with the premise that the Cemetery Workers involved in the present strike are involved in interstate commerce. The National Labor Relations Board has taken jurisdiction over Local 365 at times in the past because the tests of interstate jurisdiction have been met.

A familiar line of cases as exemplified by *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 79

S. Ct. 773, 3 L. Ed. 2d 775 (1959), have made it clear that federal legislation has pre-empted the field of labor relations in interstate commerce except in those few cases which, although involving labor disputes, are only peripheral concerns of labor law

Pursuant to this general proposition, there have been various decisions of federal and state courts to the effect that states may not abridge rights guaranteed by federal labor legislation.

In the instant situation, the State of New York, by its Cemetery Workers Statute, has violated the provisions of the concerted activities section of 29 U. S. C. 157—the right to strike provision. It must be clear that so long as any of the workers who come under the strike prohibition of the instant legislation are deprived of rights guaranteed by the federal statute, the New York statute must be invalid as unconstitutional.

On its face, the provisions of 29 U. S. C. 157 are contravened when a state statute enjoins striking when the contract governing the employees' conduct has expired and no unfair labor practice has been committed by the union or its members.

It is to be presumed that the State would argue that it was merely exercising its police power for the health and welfare of the residents of the State of New York, and therefore an exception would be created to the absolute rights guaranteed by 29 U. S. C. 157. However, this issue has been litigated often, even in relation to New York State, and it has been held that even emergency provisions relating to the public weal will fall since the federal legislation embodied in the National Labor Relations Act, as amended, has pre-empted the field of interstate labor relations.

Perhaps the most striking example of the asserted right of a state to abridge the right to strike pursuant to its police power occurred in *Grand Rapids City Coach Lines* v. *Howlett,* 137 F. Supp. 667 (D. C. Mich. 1955). That case reviewed a Michigan statute which authorized the State Labor Mediation Board to intervene in a strike despite the interstate character of the dispute. Providing procedures strikingly similar to those in the instant New York legislation, the statute required the State Mediation Board to certify that a labor dispute involved a public utility and required said Board to make a determination that the parties to the labor dispute would not be able to settle the dispute by bargaining, mediation and conciliation. Further, the Michigan legislation authorized the Governor of the State to appoint a special committee to make findings of fact in the dispute and make recommendations to the parties. During the time that this fact-finding committee was functioning, the parties were required to resume collective bargaining and strikes were outlawed. In *Grand Rapids,* the Court decided that this statute was in conflict with federal legislation, determining that the intention of Congress had been to pre-empt the field.

In *Delaware Coach Company* v. *Public Service Commission of the State of Delaware,* 265 F. Supp. 648 (D. C. Delaware 1967), the Court followed *Grand Rapids* and determined that the Public Service Commission of Delaware would not be allowed to even indirectly intervene in a labor dispute at that time occurring between Delaware Coach Company and the Union representing its employees. The Federal Court granted an injunction preventing intervention in the strike even indirectly by the Delaware Public Service Commission, ruling that "collective bargaining is a 'right' guaranteed by the National

Labor Relations Act to the parties to a labor dispute which affects interstate commerce." 265 F. Supp. 648, 651.

In *Cab Operating Corporation* v. *City of New York,* 243 F. Supp. 550 (S. D. N. Y. 1965), the Court reviewed the various authorities and concluded that state or local activity which seeks to bind the parties to a dispute which is within the jurisdiction of the National Labor Relations Board is illegal. Furthermore, the Court noted that the federal pre-emption doctrine applies not only when there are actual proceedings presenty pending before the National Labor Relations Board, but in any situation over which the Board may assert jurisdiction. See also, *Hill* v. *Florida,* 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782 (1945), wherein it was held that a state may not prevent a labor union from operating until certain procedural state requirements had been met, *International Workers Union* v. *O'Brien,* 339 U. S. 454, 70 S. Ct. 71, 94 L. Ed. 978 (1949), wherein union election provisions mandated by the state were struck down which prohibited a strike unless the statutory election procedures were followed, *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 364 (1950), wherein a statute was struck down which provided injunctive relief when a strike involved an essential public utility.

Therefore, there can be no question at this late date but that some or all of the affected Cemeteries having been involved in interstate commerce, federal legislation has pre-empted the field, and the New York legislation is unconstitutional as contravening the supremacy clause.

VI.

State instrumentalities must not be used to cause public pressure such that a strike protected by the National Labor Relations Act is brought to an end.

Similar to the point discussed immediately above, there is a developing body of federal case law which holds that one of the rights protected by 29 U. S. C. 157 is the right to "strike a bargain", and to be free from state action which places substantial pressure upon the parties to reach a conclusion to their interstate labor dispute.

Several of the cases cited in the point immediately above have so indicated. For example, in *Grand Rapids,* the court not only found federal pre-emption, but also found that the parties should be free from state fact-finding boards which might pressure them to reach a resolution of their labor dispute in an artificial manner. The court said:

> "The effect of public pressure resulting from the publication of the recommendations of the defendant fact-finding panel would compel the parties to settle their dispute on the basis recommended except as they might be in a position to resist public pressure which obviously the public utility cannot do. The plaintiff is entitled to negotiate an agreement with the union after free and unfettered collective bargaining." *Grand Rapids,* at 673.

Similarly, in *Oil, Chemical & Atomic Workers Union* v. *Arkansas-Louisiana Gas Company,* 332 F. 2d 64 (C. A. 10 1964), an injunction was granted against an attempt by the state to investigate a labor dispute and make recom-

mendations and findings of fact seeking the resolution of said dispute. The 10th Circuit noted:

> "The law commands the parties to a labor dispute to bargain collectively, by meeting at reasonable times and conferring in good faith . . . but they are not required to strike a bargain. Indeed, the whole spirit and tenor of the Labor-Management Relations Act is to encourage collective bargaining —not compel or coerce agreement." 332 F. 2d at 66.

In *General Electric* v. *Callahan*, 294 F. 2d 60 (C. A. 1 1961), the Masachusetts State Labor Board had been requested by the Governor to investigate a labor dispute then existing between General Electric and the union representing its employees. The State Board was not authorized by State statute to intervene, but was allowed to make public recommendations regarding which party to the labor dispute was in the more favorable light. The First Circuit considered this to be an interference with the right of collective bargaining guaranteed in the Labor Relations Act, saying:

> "Although the State Board has limited direct coercive power . . . nevertheless the indirect coercive effect of its actions upon the parties to a labor dispute is by no means insubstantial. Mere participation in State Board hearings would surely have some tendency to solidify positions taken at the bargaining table thereby making it more difficult later to modify or abandon a stand taken in a bargaining issue . . . [the Board's function] after investigating a labor controversy is to render a written decision to be made public and be open to public inspection advising the parties as to what they should do to end the controversy and ascertain

> which of the parties is mainly responsible or blameworthy for its existence. The obvious statutory purpose is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the national policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at . . .'' 294 F. 2d at 67.

It is submitted that in much the same way the instant New York legislation contains similar procedures for emergency conciliation, and ultimately binding arbitration, which abridge the right of the parties to reach that "voluntary agreement freely arrived at" to which the case law refers. The chief aspect of the law is the requirement that the parties be given 48 more hours to agree, or else compulsory arbitration will be imposed. This is coercive on its face, and clearly contra to the developing case law indicated in *Grand Rapids, Arkansas-Louisiana,* and *General Electric.*

VII.

There is no severability or savings clause in the statute, and if any part of the law be declared invalid, the entire statute must fall.

The Legislature failed to provide the familiar section by which, if one part of a statute is declared unconstitutional, the remainder shall continue to have full force. That failure must be fatal to this statute, since there is no general savings clause that has ever been enacted in New York State to allow the continued validity of legislation which has been declared invalid in part.

While it is a familiar axiom of legislative interpretation that a statute should be so construed to give it a constitu-

tional meaning, that maxim should not prevent the Court here from invalidating the entire statute if any part be held unconstitutional.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the New York State Court of Appeals.

Respectfully submitted,

JOHN R. HAROLD
Attorney for Petitioners
150 Broadway
New York, New York 10038
(212) WO 4-2820

APPENDIX A

Opinion of the New York State Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

against

LOCAL 365 CEMETERY WORKERS GREEN ATTENDANTS BUILDING SERVICE UNION EMPLOYEES INTERNATIONAL AFL-CIO, SAM CIMAGLIA, President, SIGMUND CZAK, Vice President, JOHN THOMPSON, Financial Secretary-Treasurer, STEVE CIMAGLIA, Recording Secretary, "JOHN DOE" and "RICHARD ROE" whose real names are unknown to the plaintiff but who are members of said Union,

Defendants-Appellants.

Question certified answered in the affirmative.

Defendant-appellants arguments concerning deprivation of due process and discriminatory action are refuted by our decision in Mount St. Mary's Hospital v. Catherwood (26 N. Y. 2d 493, Mot. rearg. den. 27 N. Y. 2d 737) and People v. Ditniak (28 N. Y. 2d 74). Neither is there improper delegation of legislative power (Chiropractic Association of New York v. Hilleboe, 12 N. Y. 2d 109; Matter of City of Utica v. Water Pollution Control Board, 5 N. Y. 2d 164; Patterson v. University of State of New York, 14 N. Y. 2d 432). There was ample evidence at special term of an emergency situation so that the application of the subject statute in this case cannot be deemed arbitrary.

All concur.

APPENDIX B

Opinion of the New York State Supreme Court, Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 28, 1973.

Present—

HON. HAROLD A. STEVENS, Presiding Justice.

ARTHUR MARKEWICH,
MYLES J. LANE,
ARON STEUER,
LOUIS J. CAPOZZOLI,
Justices.

7231N

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

against

LOCAL 365 CEMETERY WORKERS GREEN ATTENDANTS BUILDING SERVICE UNION EMPLOYEES INTERNATIONAL AFL-CIO, SAM CIMAGLIA, President, SIGMUND CZAK, Vice President, JOHN THOMPSON, Financial Secretary-Treasurer, STEVE CIMAGLIA, Recording Secretary, "JOHN DOE" and "RICHARD ROE" whose real names are unknown to the plaintiff but who are members of said Union,

Defendants-Appellants.

An appeal having been taken to this Court by the defendants-appellants from an order of the Supreme Court,

Opinion of the New York State Supreme Court, Appellate Division

New York County (Gellinoff, J.), entered on June 26, 1973, granting plaintiff's motion for a preliminary injunction, and said appeal having been argued by Mr. John R. Harold of counsel for the appellants, and by Mr. Irving Galt of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements, and the interim stay is vacated. Leave to appeal to the Court of Appeals is hereby granted on the following certified question:

> "Was the order of the Supreme Court, as affirmed by this Court, properly made?"

Enter:

Hyman W. Gamso
Clerk.

APPENDIX C

Opinion of the New York State Supreme Court, Special Term

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART ONE

Index Number 41308/1973

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

LOCAL 365 CEMETERY WORKERS GREEN ATTENDANTS BUILDING SERVICE UNION EMPLOYEES INTERNATIONAL AFL-CIO, SAM CIMAGLIA, President, SIGMUND CZAK, Vice President, JOHN THOMPSON, Financial Secretary-Treasurer, STEVE CIMAGLIA, Recording Secretary, "JOHN DOE" and "RICHARD ROE" whose real names are unknown to the plaintiff but who are members of said Union,

Defendants.

New York, N. Y.
June 2, 1973.

Before:

HON. ABRAHAM J. GELLINOFF,
Justice.

Appearances:

LOUIS J. LEFKOWITZ, ESQ., NY State Attorney General
By: HERBERT J. WALLENSTEIN, ESQ. and
MARK WALSH, ESQ., Assistant Attorneys General

JOHN R. HAROLD, ESQ.
Attorney for Defendants
150 Broadway, New York, N. Y.

Opinion of the New York State Supreme Court, Special Term

The Court: The following is the decision of the Court.

The State legislature has determined that there exists in the New York City metropolitan area an emergency situation involving potentially the inability of many thousands of families to provide a decent burial for their deceased, and the State legislature has declared that this situation, if allowed to proceed unchecked, would constitute a serious threat to the health and welfare of the citizens of the state and would cause untold grief to the bereaved families and seriously offend the public conscience.

Now, because it has long been the public policy of the state that the body of a deceased person should be decently buried as soon as possible after death, says the State legislature in the law, the legislature, stating that this policy is again being frustrated by a labor dispute and threatened strike, has acted to provide emergency procedures to facilitate the burial of the dead in and near the City of New York. This threatened strike envisaged by the law has now become a reality.

Section 2 of this law provides that upon the receipt by the Governor of the State of the certifications of the Industrial Commissioner and the Commissioner of Health certifying that there does exist a labor dispute involving the cemeteries in the New York City metropolitan area which has not been resolved and cannot be resolved through the employment of currently-authorized collective bargaining procedures, and that such dispute has resulted in an actual threat to the health and welfare of the residents of the State, the Governor may, by executive order, invoke the provisions of Section 2 of the act. The remainder of Section 2 of the act provides the machinery. It details what ensues when the Governor does invoke the provisions of Section 2.

Opinion of the New York State Supreme Court, Special Term

In substance, the procedure provided is that there is emergency mediation, and upon failure to reach an agreement, it provides for compulsory arbitration. The Governor has in fact issued the appropriate executive order invoking the provisions of the act.

Section 3 of the act provides that "while an executive order issued pursuant to the provisions of Section 2 of this act is in effect, it shall be unlawful for any person subject to the provisions of this act to engage in or to induce or encourage any strike or withholding of services or lockout of employees." The section further provides that the Attorney General shall forthwith apply to the Supreme Court of New York County for an injunction against the commencement or continuation of any strike or lockout. The strike has continued, and therefore the Attorney General has moved this Court for such temporary injunction.

The defendants contend that, as applied here, and on its face, the statute is unconstitutional. It is contended in defendant Cimaglia's testimony before the Court that an emergency health condition does not factually exist. But the statute does not leave to the Court the determination of that question. It gives the Governor the power, upon a showing sufficiently satisfying to him of a health emergency, to invoke the provisions of the act. Now that grant of power as an emergency measure, the Court rules, has been declared by the legislature, and is valid.

This Court ought not usurp the Governor's power and determine for itself the extent of the emergency. In any event, regardless of what may ultimately be established at a trial, sufficient evidence of at least an imminent health hazard has been adduced in the moving papers, and, in the Court's finding of fact, it is not sufficiently negated by the testimony of Mr. Cimaglia, to support the Gov-

ernor's conclusion and the evidence is sufficient, in the Court's opinion, to warrant immediate relief pending ultimate determination of the facts.

Moreover, inherent in the entire conduct of defendants is an affront to the declared public policy of the State that the body of a deceased person should be decently buried as soon as possible after death.

On its face, as an emergency use of the police power, the act does not offend the Federal or State constitutions. It neither violates due process nor deprives defendants of the equal protection of law. Where the public welfare demands, the legislature may bar strikes, and the classification here is a reasonable one.

The Court has considered all the arguments presented by defendants, and although eloquent and forcible and admirably presented, they do not persuade the Court that this Court, sitting nisi prius, should now invalidate the act.

Now, under the express wording of the statute, any continuation of the strike is unlawful. The statute says so. And the statute, this Court holds, is constitutional and valid, because just as the legislature has validly proclaimed it to be the policy of this State that public employees may not strike because the continuation of their services is essential to the well-being of the residents of this State, so the legislature has validly proclaimed it to be the public policy of the State that upon the occurrence of an emergency health hazard, cemetery workers may not continue a strike because their services are similarly essential to the public health, welfare and human dignity of the residents of the State.

The Court finds that the relief requested by the Attorney General is necessary to prevent the commission of the acts

specifically made unlawful by Section 3. The motion for a temporary injunction is therefore granted. Submit order granting all the relief prayed for in the notice of motion or order to show cause, with leave to the defendants, however, to resettle the order with respect to any specific or particular provisions as may be deemed particularly inappropriate.

Mr. Walsh: If your Honor please, just as we have prepared papers for appeals, if necessary, we have prepared an order in that respect. May we submit it now?

The Court: Yes.

Mr. Harold: May I respectfully ask the Court to permit the settlement of the order by next Tuesday?

The Court: No. I will sign the order immediately, right now, if it is ready, as I have announced, with leave to you to apply immediately or at any time for modification of the order, or resettlement.

Mr. Harold: Am I to understand that until I seek that modification, the order need not be immediately effective?

The Court: The order is effective immediately, right now. I am going to sign it now, after I have had a chance to look at it. But you have the right to come in at any time to have me modify any of the provisions of this order.

Mr. Harold: Then let me express my desire more specifically, perhaps differently. I wish to seek an appeal, a review. I think, by reason of the language of your opinion and the facts adduced, that at most we have a potential threat that may blossom into a fact situation. I therefore do not think it presumptuous to ask the Court to stay its decision for several days while I see if the Appellate Division would give me temporary relief on appeal.

The Court: Your application to stay is denied. You can go to the Appellate Division at nine o'clock tomorrow morning, and you can get relief there. And if before you

get to the Appellate Division you want to get to me to modify any of the provisions, I will be happy to modify any of them that you convince me are inappropriate.

Mr. Harold: It is really a very simple matter. The men either go back to work or they don't go back to work. All the language doesn't change that.

The Court: Right. So the answer is they either go back to work or they are in contempt of court.

Mr. Harold: All right. Now, in light of what you have said, I want a chance to have an appellate court look at that before having them go back to work.

The Court: Go to the Appellate Division for permission to look at it before they decide to go back to work or not to go back.

Mr. Harold: Thank you, sir.

The Court: You forget, sir, that there is a specific provision in this law which reads as follows, and I am reading from Section 3: "The Attorney General shall forthwith apply to the Supreme Court of New York County for an injunction against the commencement or continuation of any strike or lockout. If a strike or lockout commences or continues, the Court shall issue an order enjoining or restraining such strike or lockout."

So go to the Appellate Division.

Mr. Wallenstein: Your Honor, would you instruct the defendant Cimaglia to remain there so we may serve him with a copy after your Honor signs it?

The Court: He's not going to run away. This man is fighting for his rights. I'm not against him. These people ought to get together, and if I could get them together, I'd do it. He's doing what he thinks is right for the welfare of his people, but he's prevented from doing it by force of law. But he's not going to run away.

Mr. Cimaglia: Thank you, your Honor.

APPENDIX D

Chapter 585 of the New York State Laws of 1973

STATE OF NEW YORK

(Emblem)

6572

1973-1974 Regular Sessions

IN SENATE

AN ACT

To provide emergency procedures to facilitate the burial of the dead in and near the city of New York

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. There exists in the New York city metropolitan area an emergency situation involving, potentially, the inability of many thousands of families to provide a decent burial for their deceased. This situation, if allowed to proceed unchecked, would constitute a serious threat to the health and welfare of the citizens of the state, cause untold grief to the bereaved families and seriously offend the public concience. It has long been the public policy of the state that the body of a deceased person should be decently buried as soon as possible after death. This policy was specifically recognized in nineteen hundred seventy, when legislation was enacted requiring the parties to a labor dispute that was then preventing the burial of the dead to submit the dispute to binding arbitration.

This policy is again being frustrated by a labor dispute and theatened strike involving cemeteries in and near the city of New York. Long negotiations extending over more than six months have failed to resolve the dispute. Mediation efforts resulted only in a recommendation for the appointment of a board of inquiry. After extensive fact finding, the board of inquiry has recommended special legislation providing for binding arbitration of the dispute.

Paramount considerations of public health, welfare and human dignity once again require the use of all possible means, including, if necessary, the extraordinary procedures provided in this measure, to bring about an expeditious resolution of this dispute.

§2. Emergency procedures. Upon the receipt of the certifications of the industrial commissioner and the commissioner of health, respectively certifying that there exists a labor dispute involving the cemeteries in the New York city metropolitan area which has not been resolved and cannot be resolved through the employment of currently authorized collective bargaining procedures, and that such dispute has resulted in an actual threat to the health and welfare of the residents of this state, the governor may, by executive order, invoke the provisions of this section.

(a) 1. As soon as possible after the issuance of the executive order, the chairman of the state mediation board shall notify all parties to such dispute thereof.

2. The chairman shall further notify the parties that the procedures provided by this section will be invoked unless such dispute is voluntarily terminated and work resumed within forty-eight hours after such notice is sent.

3. Following such notification, the chairman shall forthwith undertake emergency mediation to bring about the voluntary resolution of this dispute and to complete the collective bargaining process, restore labor-management harmony and bring about the orderly resumption of work. Such voluntary resolution within such period, shall consist of either (A) an agreement resolving all issues in dispute, or (B) an agreement between the parties to submit all outstanding issues to binding arbitration. In either event, such voluntary resolution must provide for the immediate resumption of work.

(b) 1. If at the end of such forty-eight hour period, the parties to the dispute have not arrived at a voluntary resolution and returned to work, the chairman of the state mediation board shall certify to the industrial commissioner and to the attorney general that, in his opinion, efforts to effect voluntary settlement of the dispute have been unsuccessful.

2. Upon receipt of such certification, the industrial commissioner shall immediately issue an order submitting the dispute to final and binding arbitration by a panel of not less than three members appointed by the commissioner. Such arbitration shall be conducted in accordance with the provisions of article seventy-five of the civil practice law and rules not inconsistent with the provisions of this act. The industrial commissioner and the chairman of the state mediation board shall render all possible assistance to the arbitration panel with regard to identifying the unresolved issues in the dispute.

3. The arbitrators appointed pursuant to this section may consider the following standards in arriving at a

final arbitration decision in this dispute: (A) the interest and welfare of the public; (B) changes in the cost of living as they affect employees' purchasing power; (C) comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceedings, and the wages, hours and conditions of employment of employees doing work requiring the same, similar or comparable skills and expenditures of energy and effort, giving consideration to such factors as are peculiar to the industry involved; (D) comparison of wages, hours and conditions of employment with comparable areas; (E) the security and tenure of employment; (F) economic factors of the respective parties which are relevant to the arbitration decision; (G) such other factors not confined to the foregoing which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, arbitration or otherwise between the parties or in the industry.

4. The arbitration panel shall make its award within thirty days following the conclusion of the hearings. Such award shall be served forthwith upon the parties to the dispute, shall take effect immediately, and shall continue in effect until the parties reach agreement or, if agreement is not reached, for such period not to exceed two years as set forth in the award. Such award shall have the same effect as though arrived at by agreement of the parties pursuant to voluntary arbitration or collective bargaining.

§3. Strikes prohibited; injunctive relief. (a) While an executive order issued pursuant to the provisions of section two of this act is in effect, it shall be unlawful for any

person subject to the provisions of this act to engage in or to induce or encourage any strike or withholding of services or lockout of employees. The attorney general shall forthwith apply to the supreme court of New York county for an injunction against the commencement or continuation of any strike or lockout. If a strike or lockout commences or continues, the court shall issue an order enjoining or restraining such strike or lockout. If such order does not receive compliance, the attorney general shall forthwith apply to the supreme court of New York county to punish such violation in accordance with the provisions of the judiciary law.

(b) During the term of the arbitration award specified in subdivision four of section two of this act, the provision of article twenty-two A of the labor law shall not apply to the parties to the subject labor dispute. The supreme court of New York county shall retain jurisdiction to restrain and enjoin any violation of the provisions of this act or the provisions of any such arbitration award. In the event of a disagreement as to the meaning or application of any part or all of the arbitrator's award, any party may apply to the supreme court of New York county for clarification.

(c) In the event the parties have reached a voluntary settlement of the dispute without resort to the arbitration procedures herein, such settlement shall contain, or be deemed to contain, a provision for binding arbitration of disputes and an agreement not to strike or lockout during its term.

§4. This act shall take effect immediately and shall remain in effect until February first, nineteen hundred seventy-four.

APPENDIX E

Letter of Joseph Cimino

(Letterhead of)

THE CITY OF NEW YORK

COMMISSIONER OF HEALTH
125 Worth Street
New York 13, N. Y.

June 14, 1973

Dr. Hollis S. Ingraham
Commissioner of Health
State of New York
84 Holland Avenue
Albany, N. Y. 12208

Dear Commissioner Ingraham:

You are aware, I am sure, of the potential health problems that may be brought on by a continuation of the current strike by gravediggers which has closed down cemeteries thoughout New York City and in the adjoining counties.

The difficulties caused by such a work stoppage, especially during this season of the year with its high temperatures, involve not only physical discomfort and possible sanitation problems but also grave emotional and psychological strains as well. For many persons, interment within a very short time is a matter of strong personal and religious convictions. In some cases, unskilled individuals are engaged in digging graves with possible hazardous results.

E2

Letter of Joseph Cimino

As long as this situation continues, there will be untold grief for the bereaved families whose distress is prolonged, even to the point where serious damage to the mental health of the parties may occur. The public conscience is offended, quite justifiably, by the ongoing disruption of the normal procedures at times of great personal anguish.

Since the start of the strike on Sunday last, June 10th, my Department has been actively engaged in monitoring the situation. We have been in touch with represenatives of the union, the cemetery owners association, the funeral directors and others involved in the dispute.

We established an Emergency Review Committee comprised of key members of my staff to keep hour-by-hour track of the utilization of available storage space for the deceased. Our survey has revealed that there is no immediate danger of a shortage in this area.

Health Department representatives are inspecting, every day, each cemetery in New York City to provide up-to-date, accurate information on the situation and to make sure that all pertinent regulations concerning the disposition of the bodies are being observed.

While no serious health hazard exists at present, the threat of such a calamity is certainly in evidence. As a result, I strongly urge you to exercise the powers given to your office by recently enacted legislation so that, through your order, the necessary emergency procedures to facilitate the burial of the dead in and near the City of New York can take place.

Letter of Joseph Cimino

This action, which would in no way favor one side or the other in this labor dispute, will enable the people of New York to alleviate their grave concerns over this increasingly serious situation.

I shall be pleased to provide you and your staff with any and all information obtained on the situation by members of my Department.

Very truly yours,

JOSEPH A. CIMINO
Joseph A. Cimino, M. D., M. P. H.
Commissioner of Health

WJH: BM

PREME COURT, U. S. 73 - 594

FILED

DEC 3 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 594

LOCAL 365 CEMETERY WORKERS GREEN ATTENDANTS BUILDING SERVICE UNION EMPLOYEES INTERNATIONAL AFL-CIO, SAM CIMAGLIA, President, SIGMUND CZAK, Vice President, JOHN THOMPSON, Financial Secretary-Treasurer, STEVE CIMAGLIA, Recording Secretary, "JOHN DOE" and "RICHARD ROE" whose real names are unknown to the plaintiff but who are members of the said Union,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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LOCAL 365 CEMETERY WORKERS GREEN ATTENDANTS BUILDING SERVICE UNION EMPLOYEES INTERNATIONAL AFL-CIO, SAM CIMAGLIA, President, SIGMUND CZAK, Vice President, JOHN THOMPSON, Financial Secretary-Treasurer, STEVE CIMAGLIA, Recording Secretary, "JOHN DOE" and "RICHARD ROE" whose real names are unknown to the plaintiff but who are members of the said Union,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the New York State Court of Appeals is reported in 301 N E 2d 434, 33 N Y 2d 582, and reproduced as Appendix A annexed to the Petition for a Writ. The decision of the Appellate Division, First Department, of the New York State Supreme Court is reported in 346 N.Y.S. 2d 717, 42 A D 2d 693; and its order is reproduced as Appendix B. The opinion of Special Term of the Supreme Court, New York County (not yet reported), is reproduced as Appendix C.

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

Statute Involved

The provisions of Chapter 585 of the New York Laws of 1973 are set forth in the petition as Appendix D.

Questions Presented

1. Is this matter rendered moot inasmuch as the challenged statute will soon expire, the men have long since returned to work and the union has entered into a long-term collective bargaining agreement?

2. Does the upholding of the issuance of a preliminary injunction order satisfy the threshold requirement of finality prescribed by 28 U.S.C. § 1257?

3. Does the emergency police power enactment here challenged arbitrarily deny petitioners equal protection by creating an invidious discrimination against a particular class?

4. Does the statute fail to prescribe standards to guide the State Health and Industrial Commissioners in issuing the certifications required before the statute may be invoked, so as to deny petitioners due process?

5. Does the statute result in involuntary servitude prohibited by the Thirteenth Amendment to the United States Constitution?

Statement of the Case

Most of the factual and procedural background of the case will be found in the short syllabus which, although officially reported with the opinion of the New York Court of Appeals (33 N Y 2d 582), is not included in Appendix A. After noting the affirmance by the Appellate Division of the Special Term order granting the People's motion "for a preliminary injunction and enjoining defendants, a union of cemetery workers and the officers thereof, from, *inter alia*, engaging in a strike, concerted work stoppage or slow down during the pendency of the action", the syllabus continues (*id.* at 582-583):

> "On June 11, 1973, while defendant union was engaged in a strike against 47 cemeteries in the metropolitan area of New York City, the Governor signed into law chapter 585 of the Laws of 1973, which was based upon legislative findings that there existed in that area 'an emergency situation involving, potentially, the inability of many thousands of families to provide a decent burial for their deceased. This situation, if allowed to proceed unchecked, would constitute a serious threat to the health and welfare of the citizens of the state, cause untold grief to the bereaved families and seriously offend the public conscience'. It provided for emergency procedures to be initiated by executive order of the Governor upon receipt of certifications of the Industrial Commissioner and the Commissioner of Health, certifying that there existed a labor dispute involving cemeteries in that area which had not been resolved, could not be resolved through the employment of currently authorized collective bargaining procedures, and had resulted in an actual threat to the health and welfare of the residents of the State. It included provision for compulsory arbitration in the event the parties to the dispute could not

> arrive at a voluntary resolution; prohibited strikes while an executive order issued pursuant thereto was in effect; authorized the Attorney-General to apply to the Supreme Court, New York County, for injunctive relief against such strikes and for orders of compliance, and also provided that any party might apply to that court for clarification of a resulting arbitration award."

And finally (*id.* at 583):

> "On June 15, 1973, upon receipt of the requisite certifications, the Governor issued an executive order invoking the provisions of the statute and declaring them to be in full force and effect. In the present action by the Attorney-General for injunctive relief against defendants, they contended that the statute was unconstitutional, in that it deprived them of due process, was discriminatory, since it was directed solely to employees of cemeteries in the New York City metropolitan area, constituted an improper delegation of legislative power without standards or guidelines, and was applied arbitrarily and capriciously. The following question was certified by the Appellate Division: 'Was the order of the Supreme Court, as affirmed by this Court, properly made?'"

Answering in the affirmative, the Court of Appeals on July 3, 1973 upheld the preliminary injunction order (*ibid.*).*

The over-all strike, which began June 10, 1973 (on the heels of the "symbolic" striking in May of three cemeteries), continued until July 9, 1973, when the union membership returned to work under a settlement that became formalized later—in August—by a written contract. In the winter of 1970, an 8-week strike had been conducted against cemeteries of the same metropolitan area, resulting

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* On October 3, 1973, the remittitur of the Court of Appeals, together with the record of the proceedings before it, was filed in the office of the County Clerk, New York County, under the case Index No. 41308/1973.

in a prior enactment (Chapter 46 N.Y. Laws of 1970) to cope with the "emergency situation involving the inability of thousands of families to provide a decent burial for their deceased . . . [and] constitut[ing] a serious threat to the health and welfare of the citizens of the State . . .". The 1970 enactment is referred to in § 1 of the present statute (D1),* enacted in the hope of averting a more devastating strike in the heat of early summer.

It is the certification by the New York State (not City) Health Commissioner of a threat to the public health and welfare which, under § 2 of the instant statute (D2), is a prerequisite for invoking the prescribed emergency procedures via an executive order of the Governor. In this connection, however, the petition is so ambiguous as to be misleading. From its references (at 4, 5) to "the Commissioner of Health, Joseph Cimino" and "Commissioner Cimino", in their general as well as more specific context of "a statutory requirement that the Commisisoner of Health render a determination," the natural assumption would be that he is the *State* Health Commissioner. In truth, as the letterhead atop Appendix E will confirm (E1), he is the *City* Health Commissioner, who was neither required to nor did, in fact, "render a determination" to the Governor. Interestingly enough, Commissioner Cimino explicitly stated, in writing to *State* Health Commissioner Ingraham (whose certification was required and given), that "the threat of such a calamity [serious health hazard] is certainly in evidence [and] I strongly urge you to exercise the powers given to your office by recently enacted legislation . . ." (E2).

Reasons for Denying Certiorari

A.

Other considerations for the moment aside, the petition warrants denial in the exercise of discretion.

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* Appendix exhibits will be referred to by the exhibit letter and page number.

Not only will the emergency statute soon expire on February 1, 1974 (§ 4, D5); the strike issue itself became moot when the men returned to work on July 9, 1973 and, thereafter, the union entered into a collective bargaining contract which will expire December 31, 1975 (long after the statute). This Court has consistently refused to issue abstract pronouncements where, as here, the underlying question has been rendered moot, and there no longer remains any live case and actual, justiciable controversy. See *Local No. 8-6 Oil, Chemical and Atomic Workers (Oil Workers Union)* v. *Missouri,* 361 U.S. 363, 367 (1960). See also *Sears Roebuck* v. *Carpet Layers,* 397 U.S. 655 (1970); *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968); *Poe* v. *Ullman,* 367 U.S. 497, 508 (1961); *Brownlow* v. *Schwartz,* 261 U.S. 216 (1923); *California* v. *San Pablo and Tulare Railroad,* 149 U.S. 308 (1893).

B.

From the standpoint of basic jurisdiction, there would at very least appear to be grave doubt as to whether the state court determination tendered for review, upholding the issuance of a preliminary injunction order, satisfies the threshold requirement of finality prescribed by 28 U.S.C. § 1257.

There is, to begin with, no question of the interlocutory nature and non-finality of the determination under New York State law, as confirmed by the consideration of the case in the Court of Appeals on a question certified by the Appellate Division (Appendix A1, B2). See N.Y. Civil Practice Law and Rules § 5713, providing that where the Appellate Division authorizes appeal "from a non-final order, the order granting such permission . . . shall certify the questions of law decisive of the correctness of its determination . . .". This circumstance would plainly seem to preclude certiorari review by this Court in light of the finality requirement of 28 U.S.C. § 1257. Yet the jurisdictional question may be subject to an element of

doubt: on the one hand, the instant order might be regarded as final for § 1257 purposes under a case such as *Construction Laborers* v. *Curry*, 371 U.S. 542, 550 (1963); on the other, the more recent decision in *Chapman* v. *California*, 405 U.S. 1020 (1972), would strongly indicate to us that, just as under state law, it would now be regarded as interlocutory and non-final (and call for denial of certiorari) by this Court.

C.

Confronted with the powerful presumption of constitutionality, *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809 (1969), petitioners fall far short of overcoming it in attacking the statute on the merits.

In adopting the emergency legislation under attack, the New York Legislature undoubtedly acted in the exercise of its traditional police power, out of legitimate concern for the health and welfare of citizens of this State. It noted its express finding of the existence "in the New York city metropolitan area [of] an emergency situation"—an emergency which, "if allowed to proceed unchecked, would constitute a serious threat to the health and welfare of the citizens of the state" (§ 1 at D1).* Its further reference to earlier cemetery strikes in the area resulting in prior emergency legislation (*id.* at D1-2) underscores the urgent need for this new emergency statute. It is axiomatic that the state police power is extremely broad in scope, for "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive", *Berman* v. *Parker*, 348 U.S. 26, 32 (1954); and "[t]he police power of the State is the least limitable of all the powers of government", *Matter of Engelsher* v. *Jacobs*, 157 N E 2d 626, 627 (1959), 5 N Y 2d 370, 373, cert. den. 360 U.S. 902.

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* Of course, legislative findings are not properly the subject of judicial review, *Katzenbach* v. *Morgan*, 384 U.S. 641, 653; nor is the wisdom or necessity of the statute reviewable, *Ferguson* v. *Skrupa*, 372 U.S. 726, 730.

Petitioners' assertion that this emergency police power enactment denies them equal protection, by "creating an invidious discrimination against a particular class [consisting] of Metropolitan New York Cemetery Workers who are on strike" (petition at 2), is plainly without merit. The question of classification is one for the Legislature; its determination will be sustained where it is not purely arbitrary and any state of facts can be conceived to support the classification, the burden resting on the assailant to establish it is without any reasonable basis and essentially arbitrary, *Morey* v. *Doud*, 354 U.S. 457, 464 (1957); and see *Asbury Hospital* v. *Cass Co.*, 326 U.S. 207, 215 (1945); *N.Y. Rapid Transit* v. *City of New York*, 303 U.S. 573 (1938); *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

Here, emergency action by the New York Legislature was impelled for the second time in three years by a strike of cemeteries in the huge, densely-populated New York City metropolitan area. The 1973 strike (following about six months of unsuccessful negotiations) was even more menacing than its 1970 predecessor; its occurrence with the advent of summer gave greater reason to fear the spread of epidemic as the number of unburied bodies would, in this heavily populated area, increase rapidly and soon number in the thousands. Since the problem was created by the strike of cemetery workers in New York City's metropolitan area, there was obviously no one else and no other situs at which the statute could be aimed to effect a solution. Hence the classification rests upon an entirely reasonable and not arbitrary basis (it might well have been otherwise if extended to include cemetery workers outside of the problem area). Under these circumstances, statewide application of the statute was not required in order to satisfy equal protection requirements. See, *e.g.*, *Griffin* v. *School Board*, 377 U.S. 218, 230 (1964); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Walters* v. *City of St. Louis*, 347 U.S. 231, 237 (1954); *Salsburg* v. *Maryland*, 346 U.S. 545, 551 (1954).

Equally insubstantial is petitioners' claim of deprivation of due process because of supposed failure to prescribe sufficient standards to guide the (State) Health and Industrial Commissioners in issuing the certifications required before the statute may be invoked by gubernatorial order (in the state courts, below, the claim was raised only as to the Health Commissioner). As was pointed out in *Lichter* v. *United States,* 334 U.S. 742, 785 (1948), "it is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power". The same rationale or principle is followed by the New York State courts, *e.g. Matter of City of Utica* v. *Water Pollution Control Bd.,* 156 N E 2d 301, 304, 5 N Y 2d 164, 169, and other cases cited in the opinion below of the N Y Court of Appeals (A1). In view of the nature of the emergency found and acted upon by the State Legislature, no specific guidelines could furnish a better standard for certifying an "actual threat to health and welfare" than the expertise of the Health Commissioner used in making that determination—and so, too, with the expertise of the Industrial Commissioner in certifying inability of the parties to resolve their dispute through the usual collective bargaining procedures. To quote again from *Lichter, supra* (334 U.S. at 758): "Standards prescribed by Congress are to be read in the light of the conditions to which they are applied." In a situation such as here involved, specific guidelines might well result in paralysis were litigation to ensue over their precise meaning and application while the emergency, meanwhile, becomes progressively worse. Cf. *Weinberger* v. *Hynson, Westcott and Dunning, Inc.,* 412 U.S. 609.

Nor is there any substance in petitioners' contention respecting involuntary servitude. Such condition is non-

existent where one may quit his job or profession. *International Union* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1948); *United Mine Workers* v. *NLRB*, 184 F. 2d 392 (D.C. Cir. 1950); *Flood* v. *Kuhn*, 443 F. 2d 264 (2d Cir. 1971), affd. 407 U.S. 258. Petitioners' claim that the instant statute precludes a worker from quitting his job or calling, and taking another, is simply unfounded. The statute, properly read, makes evident that its thrust is directed only at strikes resulting from labor disputes not susceptible of being resolved through normal bargaining procedures. It is not reasonably to be understood as forbidding a worker to quit his job. Rather, it provides for the possibility of it becoming unlawful "to engage in or to induce or encourage any strike or withholding of services or lockout of employees" (§ 3 b at D5). This clearly refers to *concerted* walkouts or strikes, and plainly does *not* prohibit an individual from quitting his job and taking or seeking employment elsewhere.

D.

Petitioners also seek review of claims to the effect that the statute violates the supremacy clause by legislating in a field assertedly pre-empted by federal law, and deprives them of contract rights allegedly guaranteed them under federal law. These claims were not raised—much less passed upon—in the state court proceedings below; accordingly, they are not appropriate for review by this Court under well-settled principles, *e.g.*, *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-439 (1969); *Wilson* v. *Cook*, 327 U.S. 474, 480-481 (1946); *McGoldrick* v. *Compagnie Generale*, 309 U.S. 430, 434-435 (1939). Cf. U.S. Sup. Ct. Rule 23, subd. 1(f), 28 U.S.C.A.

In any event, there is no merit whatever in these claims. The statute, in essence, is essentially an emergency health and welfare—not labor—measure, adopted under the state police power. Moreover, petitioners did not even attempt, nor do they cite any authority, to show that the struck

cemeteries might be considered to be engaged in interstate commerce. Petitioners, without any documentation whatever (or any basis in the instant record), broadly state that the NLRB exercised jurisdiction over Local 365 "at times in the past" (Petition at 21). We understand that in two instances (both non-adversary proceedings), New York cemeteries voluntarily appeared in NLRB proceedings—a vast difference from any showing of meeting "the tests of interstate jurisdiction" (*ibid.*). But even assuming, momentarily, there was any "interstate jurisdiction" here, the circumstances are plainly such as to preclude any conclusion that federal law has deprived New York of its basic right to protect the health and welfare of its citizens under the challenged emergency statute. See *Vaca* v. *Sipes*, 386 U.S. 171, 180 (1967).

CONCLUSION

For the foregoing reasons, the instant petition for a writ of certiorari should in all respects be denied.

November 30, 1973.

Respectfully submitted,

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